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NOTE: THE XXX-FILES: CAL/OSHA'S REGULATORY RESPONSE TO HIV IN THE ADULT FILM INDUSTRY

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SUMMARY:

... California's San Fernando Valley's multi-billion dollar straight adult film industry has recently experienced an HIV scare that has the industry, Los Angeles County, and the state of California concerned about current adult film industry HIV prevention strategies. ... The HIV outbreak called into question the adequacy of adult film industry self regulation, and introduced the potential for Cal/OSHA to regulate its workers' safety. ... The 2004 HIV outbreak was the first time Cal/OSHA considered investigating health and safety conditions in the adult film industry. ... The expedited nature of adult film production alleviates the need to secure a performer's services for an extended period of time and compels a production company to budget wages based on performance per scene rather than on an hourly basis. ... In light of the nature of an adult film performer's work, it is not surprising that production companies hire performers as independent contractors. ... Cal/OSHA overcomes the obstacle presented by adult film performers' perceived independent contractor employment status by classifying adult film performers as employees. ... In response to the HIV outbreak, Cal/OSHA provided a section on their website specifically for the adult film industry. ... The 2004 HIV outbreak has presented the adult film industry with an unprecedented barrage of questions regarding its employment practices, worker safety, and the potential for state regulation to prevent further STD and HIV transmission. ...

TEXT:

[*421]

Introduction

California's San Fernando Valley's multi-billion dollar straight adult film industry has recently experienced an HIV scare that has the industry, Los Angeles County, and the state of California concerned about current adult film industry HIV prevention strategies. n1 Though the adult film industry's current prevention strategy has succeeded in detecting only 16 HIV-positive cases in over 80,000 tests performed since its inception in 1998, n2 there is a possibility that the state, through Cal/OSHA, will step in and attempt to establish its own standard for HIV and STD prevention. n3 The

main concern arising from this possibility centers on the state's ability to regulate employees, and not independent contractors. n4 Currently, most adult film performers are hired as independent contractors. n5 If Cal/OSHA is able to show that adult film performers are actually employees, then it will have the authority to regulate the adult film industry. n6

Part I of this article provides insight into the adult film industry, how it became localized in California's San Fernando Valley and current trends of filming in foreign locations. The HIV outbreak occurred as a result of the lack of precautions taken during a production filmed in Brazil. n7 The outbreak caused [*422] major concerns among the community regarding the adequacy of HIV and STD prevention measures. n8 Cal/OSHA instigated an unprecedented investigation into the adult film industry's current HIV and STD prevention procedures, and called into question the employment status of adult film performers. n9

Part II lays out the common law tests for establishing employee status. The "right to control" test has been employed by the courts to determine employee status where an employer has hired a worker as an independent contractor, but has actually retained control over the manner in which the work is carried out. n10 The "economic realities" test differs from the right to control test in that it provides an additional inquiry into the economic dependence of the worker. n11 Cal/OSHA used a combination of the two tests to determine that adult film performers are employees not independent contractors. n12 Adult film production companies traditionally hire performers as independent contractors, and are skeptical of Cal/OSHA's finding that adult film performers are employees. n13 Part II also considers whether Cal/OSHA's determination was well-founded on established legal principles and likely to withstand challenges by the adult film industry.

Part III inquires into the current regulatory procedures for HIV and STD transmission prevention. n14 The adult film industry created the Adult Industry Medical (AIM) Healthcare Foundation in order to provide adult film performers with reliable HIV and STD testing. n15 In addition, the adult film industry utilizes its close knit community to enforce routine testing. n16 The HIV outbreak called into question the adequacy of adult film industry self regulation, and introduced the potential for Cal/OSHA to regulate its workers' safety. n17 The potential regulation by Cal/OSHA has caused the adult film industry to threaten to move underground [*423] in order to avoid regulation. n18 Part III also provides insight into appropriate ways for Cal/OSHA to regulate the adult film industry without causing it to move underground.

I. Background

A. The Adult Film Industry

Eighty percent of all straight adult films are produced in California's San Fernando Valley. n19 The California Supreme Court allowed the porn industry to grow through its 1988 decision in *California v. Freeman*. n20 In *Freeman* the court held that actors can be hired to perform sexual acts in films as long as the actors are not paid "for the purpose of sexual arousal or gratification [of the filmmaker or the actors]," but rather for the purpose of making a non-obscene movie. n21 With porn legal in California, the adult film industry expanded in the San Fernando Valley as increasing numbers of young people moved to the Los Angeles area in hopes of making it in Hollywood. n22 Adult film producers capitalized on inexpensive filmmaking and promises of fame and fortune to frustrated young actors turned away from Hollywood. n23

Brazil boasts Latin America's largest porn industry, n24 and the second highest incidence of HIV and AIDS in the western hemisphere. n25 The tropical landscapes, cheap production costs and beautiful women lead many American straight adult film industry producers to outsource adult film production to Brazil. n26 Most American straight adult film producers who film in Brazil bring their own male [*424] talent, and hire Brazilian actresses. n27 The actresses often work as prostitutes as well, and do not rely on HIV testing to monitor the spread of HIV. n28 Brazilian actresses are incentivized to work without condoms because they can double their pay by participating in unprotected sex scenes. n29 Many American males who film in Brazil perform in unprotected sex scenes, a risk that most Brazilian male actors

are not willing to take. n30

About seventeen percent of the San Fernando Valley's straight adult film performers regularly use condoms during film production. n31 The community currently uses regular HIV and STD testing to protect performers from becoming infected. n32 Peer pressure resulting from actors and actresses having frequent contact with each other ensures that test results are kept current. n33 Increasing adult film production in Brazil and other foreign countries integrates outsiders into the San Fernando Valley's straight porn community. n34 Unprotected sex with high risk partners who are not subject to the same peer pressure as the members of the San Fernando Valley community places the entire community at risk. n35

B. The HIV Outbreak

On April 10, 2004, two adult film performers, Darren James and Lara Roxx, tested positive for HIV. n36 It is believed that James contracted the virus while working on a production in Brazil on March 10, 2004. n37 He and Roxx performed together in a film shortly after James returned to the United States. n38

After James and Roxx's HIV-positive status surfaced, 30 production companies participated in a 60-day moratorium in order to test all workers who had engaged in sexual contact with the two HIV positive actors to prevent further [*425] transmission of the virus. n39 The test results uncovered three additional HIV-positive performers who had contracted the virus from James. This caused concern about the health and safety of actors in the adult film industry. n40

Los Angeles County Department of Health brought the HIV outbreak to the attention of the California Occupational Safety and Health Act's Division of Occupational Safety and Health (Cal/OSHA), n41 and requested that it investigate and evaluate worker safety conditions in the adult film industry. n42 Cal/OSHA released a statement that it would investigate the situation, but noted that its investigation would be limited to production companies that employed adult film workers. n43 Independent contractors are not legally considered employees and are not entitled to Cal/OSHA's protection; Cal/OSHA is permitted to investigate only if production companies violate state injury and illness prevention laws or if their blood borne pathogen precautions are inadequate. n44 The 2004 HIV outbreak was the first time Cal/OSHA considered investigating health and safety conditions in the adult film industry. n45

Los Angeles County Department of Health and Cal/OSHA were not alone in having an interest in investigating worker health and safety conditions in the adult film industry. Members of the adult film industry, prominent health advisors and officials in the Los Angeles area and legal advisors convened for an informational hearing chaired by Assemblyman Paul Koretz of the 42nd District of the California [*426] State Assembly. n46 The goal of the hearing was to discuss employment status of adult film performers and potential regulation of worker safety. n47 The hearing was arranged to acquire information needed by the government to determine how best to address the HIV outbreak and to prevent future incidents. n48 Though the committee did not reach any conclusions regarding the government's potential role in improving adult film worker safety, constructive recommendations were offered by various participants at the hearing, n49 including required condom use. n50 Requiring condom use may also be the most controversial recommendation because Cal/OSHA would be the regulating agency ensuring condom use in adult films.

Cal/OSHA's investigation of the HIV outbreak concluded with citations issued to two production companies. n51 TTB Productions and Evasive Angles were found to have violated California's Blood Borne Pathogen (BBP) standard; n52 both companies were fined because it was unclear which company was responsible for the scenes that caused the three individuals to be exposed to HIV. n53 Both companies are challenging the citations, n54 and the straight porn community is questioning Cal/OSHA's ability to regulate the working conditions of adult film performers. n55

[*427]

II. Independent Contractors or Employees

At the time of the outbreak it was uncertain whether Cal/OSHA would have the authority to regulate adult film performers. n56 In order to reach the issue of regulation, Cal/OSHA first needed to assess the employment status of adult film performers. Cal/OSHA's investigation revealed that independent contractors in the adult film industry may be regulated by Cal/OSHA. n57

Common law and statutory distinctions between employees and independent contractors differ; the common law helps "limit [the employer's] vicarious liability for the misconduct of a person rendering service to him," n58 whereas, legislation focuses on "which injuries to the employee should be insured against by the employer." n59 Legislation enacted to protect workers distinguishes between employees and independent contractors and limits coverage to employees. n60 Removing employer liability for independent contractors comes from the premise that the independent contractor "is best situated to distribute the risk and cost of injury as an expense of his own business." n61 When the statutory definition of an employee or an independent contractor is vague, courts are more likely to rely on common law to determine employment status. n62

A. Common Law and Statutory Rationales for the Distinction

The common law distinguishes between independent contractors and employees to limit employer liability for injuries sustained during the course of employment. n63 Where the worker works independently and is in the best position to make decisions regarding his safety, common law insulates employers from liability when these workers are injured during the course of their work. n64

1. Right to Control Test and Economic Realities Test

The right to control test, often referred to as the common law test, n65 is the most frequently used test to determine the employment status of a worker. n66 This test is utilized by courts when a statute lacks a sufficient definition of [*428] "employee." n67 The right to control test regards the degree of control the employer exerts over the work performed as the most important factor in determining employment status. n68 The Restatement (Second) of Agency, 220 lays out the factors of the right to control test: n69

(a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee. n70

The economic realities test is another common law test applied by courts to determine employment status. n71 This test is most often applied in circumstances involving social legislation; n72 "[the test] seeks to protect workers who are dependent upon their employers to make a living." n73 The economic realities test was used by the United States Supreme Court in *United States v. Silk*, n74 where the Court thought it was necessary to consider all of the circumstances of the employment relationship in order to carry out the legislative goals. n75 These factors include:

(1) the degree of the alleged employer's right to control the manner in which the work is to be performed; (2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; (3) the alleged employee's investment in equipment or materials required for his task, or his employment of helpers; (4) whether the service rendered requires a

special skill; (5) the degree of permanence of the working relationship; (6) whether the service rendered is an integral part of the alleged employer's business. n76

[*429] After the Court's decision in *Silk*, however, Congress amended the Social Security Act to ensure that the common law test would be used to construe the statute. n77 In *Nationwide Mutual Insurance Co. v. Darden*, n78 however, the Court made clear that Congress did not overrule the use of the economic realities test for statutory interpretation; n79 the common law test will be used unless the statute indicates otherwise. n80

California courts have applied the economic realities test in employment status disputes. n81 The court in *S.G. Borello & Sons, Inc. v. Dep't Indus. Relations*, n82 however, noted that the right to control test was not sufficient on its own to evaluate employment status, n83 and utilized the economic realities test in conjunction with the right to control test to determine worker status. n84 The court thought it consistent with the Workers' Compensation Act to consider additional factors to determine employment status. n85 This method of statutory interpretation is not inconsistent with the Court's holding in *Nationwide*.

B. Employment Practice in the Adult Film Industry

A majority of the performers in the adult film industry are hired as independent contractors. n86 Production companies occasionally employ adult performers as employees by entering into contracts that guarantee their services under specific conditions. n87 "Actors and actresses who have a contract with a production company for an extended period of time, have taxes withheld from their paychecks, and file w-4 forms are considered employees." n88 Oftentimes, adult film production takes place over a short period of time and on a limited budget. n89 Producers rationalize that since the performers are paid by the scene and work on a different production every day, they are not entitled to employee status. n90 The expedited nature of adult film production alleviates the need to secure a performer's services for an extended period of time and compels a production company to [*430] budget wages based on performance per scene rather than on an hourly basis. This ultimately leads production companies to hire performers as independent contractors.

In light of the nature of an adult film performer's work, it is not surprising that production companies hire performers as independent contractors. n91 However, an employment contract signed by the performer, indicating an independent contractor-employer relationship, is not dispositive of an employee-employer relationship. n92 Since the definition for the term "employee" under the California Labor Code is vague, n93 courts will apply common law to determine a worker's employment status. n94 Courts will assess the worker-employer relationship for each situation, and apply the appropriate test.

C. Cal/OSHA's Determination of Employment Status

Before Cal/OSHA's investigation, it appeared that its ability to regulate adult film performers in the adult film industry would be limited. n95 Most adult film performers are hired as independent contractors, and Cal/OSHA's jurisdiction only covers employee-employer relationships. n96 Cal/OSHA overcomes the obstacle presented by adult film performers' perceived independent contractor employment status by classifying adult film performers as employees. n97

Cal/OSHA and the Division of Labor Standards Enforcement (DLSE) utilize the right of control test and the economic realities test considered by the California Supreme Court in *S.G. Borello* to determine employee versus independent contractor status. n98 The DLSE emphasizes that the additional factors from the Restatement (Second) of Agency are informative, and that employment situations where the employer "has control or the right to control the worker both as to the [*431] work done and the manner and means in which it is performed," n99 are the most indicative of employee-employer relationships. n100

Cal/OSHA worked in conjunction with the DLSE to determine the nature of the employment relationship between adult film production companies and the performers involved in the HIV outbreak. n101 Some of the aspects considered while establishing employee status "included the nature of the work being performed, the degree of control the

employer has over how that work is being done, how the work was directed, and whether the principal or the workers supplied the instruments, tools, or location where the business was being conducted." n102 Utilizing factors routinely employed by the DLSE, the agencies concluded that in this particular employment situation, the performers were employees. n103

Cal/OSHA explains on its website, that employment status will be determined on a case-by-case basis. n104 Cal/OSHA's investigation into the straight adult film production companies who employed the two original performers infected with HIV resulted in a finding that the two performers were employees rather than independent contractors. n105 The factors Cal/OSHA considered reflect the degree of control the employer had over the work conducted by the first two performers found to have tested HIV positive. The Cal/OSHA investigators found that the employment relationship resembled a situation where the employer was in control of the performers' schedule, and the manner in which the work was to be carried out. n106

D. Strength of Cal/OSHA's Determination

Whether adult film performers really are employees is debatable; when asked by Cal/OSHA officials, both performers and production companies thought performers were independent contractors. n107 The general consensus of the adult film industry is that Cal/OSHA is "[stretching] to suggest that actors who are hired on a non-permanent, no-regular-hours situation should be considered payroll employees and not independent contractors." n108 Though agency officials indicated that they found an employee-employer relationship in this particular situation, they were also careful to note that adult film performers will not be classified as employees in every situation. n109

[*432]

1. Employment Status for Tax Purposes

Much of the criticism coming from the adult film industry regarding Cal/OSHA's decision to regulate focuses on the skepticism that adult film performers are employees. n110 Employers and workers may prefer to establish an independent contractor-employer relationship because results in employers having fewer payroll encumbrances and independent contractors having fewer deductions taken from their paychecks. n111 The Internal Revenue Service (IRS) evaluates the employer-worker relationship using 3 main categories: behavioral control; financial control; and relationship of the parties. n112

a. IRS Test

The behavioral control prong of the IRS test for determining employment status evaluates the degree of control the employer has over the work performed. n113 This prong of the test is similar to the "right to control" test the S.G. Borello court used. n114 The adult film production companies argue that performers are independent contractors because they are hired on a temporary basis and for short periods of time. n115 The IRS test, however, places greater emphasis on the control over the manner in which the work is performed. n116 Currently, only seventeen percent of straight adult film performers regularly use condoms. n117 Production companies claim that straight adult film performers have the choice of demanding condoms, however, the job will most likely be offered to someone who does not request condom use. n118 If performers want to work, then they have to submit to the pressure of the production companies. Straight adult film production companies [*433] pressure workers to perform a certain way, indicating an employer-employee relationship. n119

The IRS considers the amount of financial control the employer exerts over the employment relationship. An independent contractor is more likely to contribute a significant financial investment in his or her work; the greater the financial investment, the greater the control over the work performed. n120 Production companies are concerned that requiring condom use during film production will result in decreased profits. n121 Performers have a lesser financial interest in films than the production companies, since "[performers] do not receive residuals, royalties, or extra money

when scenes are reused and re-released in other features." n122 Performers invest their time in shooting a scene in a film, receive payment for the scene, and then move on to a different employer the next day. n123 This is hardly a financial investment significant enough to find an independent contractor-employer relationship.

Adult film performers often sign contracts stating that they are being employed as independent contractors. n124 However, a signed agreement between the worker and the employer stipulating independent contractor status is not determinative of an independent contractor employment relationship. n125 The IRS test uses the written contract to determine the intent of the parties if the other facts available are not sufficient to determine employment status. The behavioral and financial control factors support finding an employer-employee relationship. "Even when actors sign statements declaring themselves independent contractors, state law does not allow them to waive their basic rights as employees." n126 Issuance of these forms does not determine the existence of an independent contractor-employer relationship, rather it is a consequence of that relationship. n127

[*434]

b. Safe Harbor Provisions

The same worker can be characterized as an independent contractor or an employee depending on the law used for determining employment status. n128 Section 530(a) of the Revenue Act of 1978, as amended by Section 269 of the Tax Equity and Fiscal Responsibility Act of 1982, n129 prevents the IRS from reclassifying independent contractors as employees where employers have consistently treated their workers as independent contractors, "unless the [employer] had no reasonable basis for not treating the [worker] as an employee." n130 Courts may find that the safe harbor provisions of Section 530(a) of the Revenue Act of 1978 apply to adult film performers' employment status, entitling adult film production companies to continue classifying performers as independent contractors. However, these IRS safe harbor provisions only apply to employment taxes; n131 Cal/OSHA and the DLSE utilize the right to control and the economic realities test to establish employment status for occupational safety. n132

2. Employment Status Under the Right to Control and Economic Realities Tests

Cal/OSHA found employee status for straight adult film workers who were originally characterized as independent contractors. "Cal/OSHA worked with the [DLSE] to establish whether or not adult performers should be viewed as independent contractors or employees." n133 The S.G. Borello court used both the right to control test and the economic realities test to determine employee status. n134 [*435] The adult film industry is skeptical about Cal/OSHA's determination. n135 Cal/OSHA's continued ability to regulate the adult film industry hinges on the strength of the decision, and the consideration of all the relevant factors relating to the employment relationship.

a. Production Companies Control and Supervise the Work Performed

The right to control the work performed is one of the most important factors considered when determining employment status. n136 Employers retain the right to control the work performed by employees; n137 independent contractors have more freedom in performing the key elements of their work.

Adult film production companies are interested in making the greatest profit on their product as possible. One of the biggest concerns about Cal/OSHA's regulation is the possibility of mandatory condom use. n138 Condoms sell fewer movies because customers do not want to see them. n139 Many adult filmmakers are threatening to leave California or move their productions underground should the state implement mandatory condom usage. n140

In *Toyota Motor Sales, U.S.A. v. Superior Court*, the court stated that the test for ascertaining employment status is, "whether the employee was subject to the employer's orders and control and was liable to be discharged for disobedience or misconduct." n141 Performers have the option of requesting condoms. n142 On the surface this would suggest that adult film performers actually have a choice to wear condoms while filming. However, performers actually

risk losing work if they make the request. n143 Since films have larger earning potential if they do not feature condom use, condom-optional companies prefer to offer jobs to performers who do not request condoms. n144 The few production companies that require condoms do not leave performers the discretion to work without them. n145 Straight adult film performers effectively do not have the choice to wear condoms; production companies make that decision for them.

[*436] Production companies hire performers to carry out specific sexual acts on film. The nature of the act itself is determined by the production company, n146 and is performed under the production company's direction. n147 Scenes sometimes require several hours to film, and require prolonged sexual contact in order to obtain a well shot scene. n148 Production companies have control over the sexual acts shot during film production, leaving the performer without any meaningful discretion in performing his or her duties that would enable a finding of independent contractor status. n149 The performers are needed only to act out the specific sexual act, and the maneuvers required are inherent in the sexual act performed. n150 Production companies' control over workers' performance in their films indicates that adult film performers are treated as employees as opposed to independent contractors. n151

Independent contractors generally do not require much supervision since they retain the right to control their work. n152 Production companies supervise adult film performers' work to ensure that they attain the best marketable product. A scene may be filmed several times until the director is pleased with the result. n153 Major production companies produce mainstream movie quality films containing plot development and featuring attractive, well-spoken performers. n154 A majority of the production companies create films depicting risky sexual encounters, catering to market demands. n155 Performers are not left with meaningful discretion in how to perform their work. This type of supervision suggests that performers work as employees rather than as independent contractors. n156

[*437]

b. Performers' Work Is Not Distinct from That of the Production Companies' and They Play an Integral Role in the Success of the Business

Employees engage in work that is consistent with the business goals of the employer. n157 Production companies make adult films in order to capitalize on the low production costs n158 and the increasing popularity of adult films among consumers. n159 It is advantageous for adult film performers to work in an industry that is in demand. As adult films become more popular, more work becomes available for both production companies and performers. Well-known performers enjoy more money for their films, while production companies capitalize on the notoriety by increasing the number of films featuring the performer. Adult film performers conduct work that is consistent with the production companies' business. n160

Production companies are dependent upon performers for the success of their business. "An employee will likely play a central role in the employer's enterprise." n161 The adult film industry generates about \$ 9-\$ 14 billion a year. n162 Production companies are able to generate that profit by keeping production costs low, n163 and featuring attractive performers who engage in extreme sexual acts. n164 Depicting performers a certain way in films can increase the amount of profit earned for an adult film. n165 Performers are the focal point of the film, their pictures grace the cover of the film, and their performances make up a majority of the material in the film. n166 Performers are clearly an integral part of the production company's business. n167

c. Production Companies Supply the Equipment, the Location and the Investment for the Film

One factor that has helped increase the size of the adult film industry is the use of the personal video camera. n168 The individual components of an adult film production in general, have been technically reduced and rendered production less [*438] expensive. n169 "You don't need special lighting. You don't need anything except a camera that costs \$ 2000 or less ... and a couple of people in a room in your home." n170 Though equipment and locations are easily accessed, the production companies provide the required materials for the production and performers simply report to

the production site. n171 Performers do not provide any equipment required for production, indicating that performers are employees of the production companies. n172

In addition to performers not providing any of the equipment needed for production, performers contribute a minimal investment to the production. Adult film performers invest their time during the film production, and get paid by the scene. n173 Adult film production costs have decreased since the introduction of the personal video camera, n174 however, the relative investment of adult film performers compared to production companies is minor. n175 The time a performer invests into film production is not a monetary investment that would suggest independent contractor status. n176

d. Performers Do Not Need a Special Skill

Independent contractors distinguish themselves from employees by exploiting their special skills to complete the project they were hired for. n177 Adult film performers do not require a special skill to work. "No special skill is required for performing in the sex industry." n178 Performers do not need to have prior experience in the adult film industry to participate. n179 Some production companies travel to exotic locations to film foreign women who have never before participated in adult film. n180 The lack of skill required of adult film performers is indicative of employee status. n181

[*439]

e. Performers Are Hired on a Temporary Basis, and Only for the Duration of the Shoot

Independent contractors tend to work for limited amounts of time, and move from one job to another with greater frequency than employees. n182 Some performers have exclusive or semi-exclusive contracts with production companies. n183 However, a majority of performers in the adult film industry work for a company on a temporary basis, shoot one scene, and move on to the next film. n184 This temporary work situation suggests an employer-independent contractor relationship. The court in *Reich v. Circle C. Investments*, n185 however, found that even though there was a lack of permanency in adult entertainers' employment, the other factors considered indicated employee status. n186 Though this factor suggests that performers are independent contractors, in light of the other factors considered, a finding of employee status is well supported.

f. Signed Agreement is not Determinative of an Independent Contractor-Employer Relationship

As discussed above under the section addressing employment status for tax purposes, a signed contract stipulating independent contract status is not determinative of independent contractor status. n187 Should the other factors considered provide insufficient evidence to determine the nature of the employment relationship, a signed contract will be considered to suggest the intent of the parties. Many adult performers sign documents establishing independent contractor-employee relationships. n188 The signed document suggests that performers are independent contractors; yet, in light of the other factors considered, a finding of employee status is well supported.

III. Regulation

The San Fernando Valley's high concentration of straight adult film talent creates a pool of performers who work together on a regular basis. n189 Performers and health workers are aware of the high risk of sexually transmitted disease transmission due to the nature of their work in adult films. n190 The adult film industry addressed these risks by establishing the Adult Industry Medical (AIM) [*440] Healthcare Foundation in 1997 after several actresses tested positive for HIV. n191 Since the Foundation's establishment, the adult film industry has been self-regulating, utilizing the Adult Industry Medical Health Care Foundation (AIM) for all of its HIV and other STD screening needs. n192 The HIV outbreak raised concerns about the adult film industry's ability to protect performers' health and safety. For the first time, Cal/OSHA has investigated worker health and safety conditions in the adult film industry. n193 The investigation

is raising concerns in the adult film industry about potential negative effects of state regulation. n194

A. Adult Film Industry Regulation

The straight porn industry utilizes a thorough testing process to screen performers for sexually transmitted diseases; keeping a reasonable timeline for screening various diseases. n195 The testing requirements established by AIM have performers tested monthly for HIV, Chlamydia, and Gonorrhea; tested every six months for Syphilis and for general health; and tested for Hepatitis and receive information regarding the adult film industry and STD prevention education upon entry into the adult film industry. n196 These routine procedures have kept STD transmission rates in the adult film industry below the transmission rates of the rest of California's population, n197 and prevented HIV transmission in the adult film industry since 1999. n198

Unlike the straight porn industry, the standard practice in the gay porn industry is to use condoms during filmmaking. n199 While the straight porn industry is centralized, the gay porn industry has performers participate from all over the world, which makes routine HIV testing difficult to enforce. n200 Maintaining [*441] current records of all performers' HIV status in the gay porn industry is difficult, n201 and gay adult film production companies and performers would not benefit from HIV testing. n202 Negative tests result in a presumption HIV negative status when performers are not. n203 Actors benefit more from relying on condoms than HIV testing. n204

The large number of people in the gay population that became infected with HIV in the 1980s and early 1990s motivated most of the gay community to use condoms to prevent transmission. n205 Ultimately, it is not profitable for gay porn to depict unprotected sex since gay porn providers refrain from carrying films depicting unprotected sex in fear of the public's disapproval. n206 Both the decentralized nature of the gay porn industry and the financial incentives for distributing films depicting condom use promote condom use in gay porn rather than HIV testing to prevent HIV transmission. Unlike the gay porn industry, the straight adult film industry fears that their audience will not welcome the presence of condoms in films. The straight porn industry is concerned that required condom use will decrease the profits of adult films. n207 Straight adult film production companies threaten to move underground to escape the requirement. n208

B. Shortcomings of Adult Film Industry Regulation

The inadequacies of self regulation in the straight porn industry surfaced during the HIV outbreak. The quarantine protocol was established by AIM for performers who travel abroad to perform in adult videos. Though the protocol is approved of and followed by many performers in the adult film industry, it is not enforced. n209 The protocol consists of having a performer undergo a PCR/DNA test immediately upon arriving back into the U.S. n210 For two weeks the performer could choose to work, but only with condoms. n211 After the two week period [*442] passed, the performer would then undergo a second PCR/DNA test, and when those test results came up negative, the quarantine would be over. n212

Upon returning to the U.S., one week after being exposed to the virus in Brazil, James submitted to his initial HIV test. n213 After those results returned negative, he returned to work. n214 James worked with 13 women before a second test came back positive; three of the women James worked with have tested HIV positive. n215 Had James either worked with condoms or refrained from working until he tested negative twice, the chance that the virus would have been transmitted to anyone else would have greatly diminished. n216 The adult film industry's inability to keep track of individuals who should be minding the quarantine is a serious shortcoming of regulating individuals who return to the U.S. after working in foreign locations.

Currently, the adult film industry is not equipped to keep track of performers who break quarantine. The database used by AIM to monitor the work history of performers (Adult Dat), lacks the capacity to monitor individuals who should be under quarantine. n217 Adult film industry regulation has worked up to this point because of the peer pressure exerted by performers to make sure that all performers carry up to date tests reporting their health status. n218

A database maintained by performers to keep track of performers who have left the country would work by the same rationale.

C. Regulation by Cal/OSHA

In the few months following the outbreak, actors and organizations affiliated with the adult film industry released statements revealing their fear that Cal/OSHA and the California legislature would attempt to regulate employees causing the adult film industry to react by going underground. n219 Moving underground would allow the adult film industry to avoid regulation. n220 Since eighty percent of all straight adult film is produced in California's San Fernando Valley, n221 legislation enacted and regulation enforced in California would have the largest impact on work conditions for adult film actors.

In response to the HIV outbreak, Cal/OSHA provided a section on their website specifically for the adult film industry. n222 The section informs that [*443] although independent contractors are not considered employees under the law, adult film actor's employment status is reviewed on a case by case basis, and they may be ultimately classified as employees. n223 Cal/OSHA has the power to regulate situations involving employer-employee relationships. n224 When this relationship exists, Cal/OSHA may take reasonable measures to ensure that employees enjoy a safe and healthy work environment. n225 Cal/OSHA's investigation found that two production companies, Evasive Angels and TTB Productions, violated California's blood borne pathogen standard by not providing adequate protection for the performers against blood borne pathogens. n226

Considering the inadequacies of the adult film industry's self regulation, plenty of opportunity exists for Cal/OSHA to step in and compensate for the adult film industry's shortcomings. Participants at the "Worker Health and Safety in the Adult Film Industry" hearing were pleased with the success AIM has had in monitoring and preventing HIV and STD transmission, n227 but it is clear that more can be done to ensure continued disease transmission. n228 Cal/OSHA has an interest in maintaining a safe work environment for employees. n229 The most obvious shortcoming in adult film industry regulation concerns the quarantine protocol for performers who participate in adult films in foreign locations. The current protocols established by AIM may be effective at preventing HIV transmission, but it seems that the main downfall regarding the protocols is that AIM is not equipped to enforce them. n230 Since this is where the adult film industry's regulatory protocols broke down and HIV transmission occurred, Cal/OSHA could focus on short term goals, work with AIM and implement an enforceable quarantine protocol. This appears to be a viable option due to the availability of databases developed for the purpose of tracking performers' sexual contacts. n231

The adult film industry's main concern about regulation by Cal/OSHA is that condom use will be mandatory. n232 Much of the concern surrounds the threat that [*444] the adult film industry will move underground, n233 which will subject performers to risks that come with decreased compliance with AIM protocols. n234 Since Cal/OSHA has an interest in maintaining employee safety, n235 it has an interest in keeping the adult film industry from moving underground. Cal/OSHA should maintain employee safety by continuing to allow AIM to monitor STD and HIV transmission, and assist them with protocol enforcement. n236

Conclusion

The 2004 HIV outbreak has presented the adult film industry with an unprecedented barrage of questions regarding its employment practices, worker safety, and the potential for state regulation to prevent further STD and HIV transmission. Cal/OSHA's determination that adult performers are employees has caused much concern in the adult film industry regarding state regulation, and the potential for it to move underground to avoid regulation. Cal/OSHA's determination of employee status was founded on well-settled legal principles, and is likely to withstand challenges posed by adult film production companies.

Cal/OSHA's initial inquiry into adult film industry regulation resulted in finding employee status for adult film performers. The next step of the inquiry concerns the extent Cal/OSHA is willing to regulate. The adult film industry

has successfully self-regulated since 1999. n237 With growing concerns of the adult film industry moving underground, Cal/OSHA has to perform a balancing act. Implementing extensive regulations might leave Cal/OSHA without an accessible adult film industry to regulate. Not regulating at all might result in additional preventable HIV transmissions within the adult film industry. Adult film industry executives argue that the market determines what sells, n238 but exclusively self-regulating may leave the adult film industry without the ability to ensure the health of their performers.

Legal Topics:

For related research and practice materials, see the following legal topics:

Labor & Employment Law Occupational Safety & Health Civil Liability Labor & Employment Law Occupational Safety & Health Duties & Rights Workers' Compensation & SSDI Coverage Actions Against Employers Intentional Misconduct

FOOTNOTES:

n1. Worker Health and Safety in the Adult Film Industry: Hearing Before the California State Assembly Committee on Labor and Employment (2004) [hereinafter Committee on Labor and Employment Report].

n2. Id.

n3. Adult Film Industry Balks at Mandatory Protection After Actors Contract HIV, 31 Cal. O.S.H. Rep., No. 18, Apr. 30, 2004.

n4. Id.

n5. Id.

n6. Committee on Labor and Employment Report, *supra* note 1, at 2 (stating that "where there is an employer-employee relationship, Cal/OSHA has the authority and the obligation to take reasonable measures to enforce the law in order to remove a hazard and protect employees").

n7. Alan Clendenning, HIV Case Airs Secrets of Porn Industry, Miami Herald, Apr. 29, 2004, at 16A.

n8. Adult Industry, Adult Consequences, 31 Cal. O.S.H. Rep., No. 36, Sept. 24, 2004 [hereinafter Adult Industry, Adult Consequences].

n9. Id.

n10. S.G. Borello & Sons, Inc. v. Dep't Indus. Relations, 769 P.2d 399, 404 (1989).

n11. United States v. Silk, 331 U.S. 704, 712-19 (1947); Carrie Benson Fischer, Employee Rights in Sex Work: The Struggle for Dancers' Rights as Employees, 14 Law & Ineq. 521, 539 (1996).

n12. Independent contractor versus employee, Div. Lab Standards Enforcement (DLSE), at <http://www.dir.ca.gov/dlse/FAQIndependentContractor.html> (Sept. 28, 2004); "[The Labor Commissioner's office] applied standard questions," including "whether the person performing the services was engaged in activities separate from that of the business, is the work part of the regular business, does the business supply to the tools, instruments and place for the work." Adult Industry, Adult Consequences, supra note 8.

n13. Adult Industry, Adult Consequences, supra note 8.

n14. Recommendations & Requirements for the Adult Entertainment Industry as presented to the Industry-wide meeting on 5-8-03, Adult Industry Medical Health Care Foundation, at <http://www.aim-med.org/Recommendations.html> (Oct. 20, 2004) [hereinafter Recommendations & Requirements].

n15. Positive HIV tests causes changes in porn filming industry, AIDS Pol'y & L., May 10, 2004.

n16. Larry Flynt, Porn World's Sky Isn't Falling - It Doesn't Need a Condom Rule, L.A. Times, Apr. 23, 2004.

n17. "Two OSHA standards were identified as providing authority for state regulation of the adult film industry: the Injury and Illness Program Standard and the Bloodborne Pathogens Standard." Committee on Labor and Employment Report, *supra* note 1, at 2.

n18. Lisa Richardson & Caitlin Liu, *State, County May Require Condoms in Adult Films*, L.A. Times, Apr. 20, 2004; Mark Kernes, *Public Hearing Seeks Answers to HV Dilemma: Will Condom Use and HIV Testing Be The Law?*, Free Speech Coalition, June 6, 2004 (the Free Speech Coalition is a trade organization for the adult film industry), at http://www.freespeechcoalition.com/news_events_col2.htm (Sept. 27, 2004) [hereinafter Free Speech Coalition 2].

n19. U.S. Dep't of Justice, Attorney General's Commission on Pornography, Final Report 4.2.1(1986) [hereinafter Attorney General Report].

n20. *California v. Freeman*, 758 P.2d 1128 (1988). The adult film industry has grown to be a \$ 9-billion-to-\$ 14-billion business. See Flynt, *supra* note 16.

n21. *Id.*; See also P.J. Huffstutter, *See No Evil*, L.A. Times, Jan. 12, 2003 (explaining that "making heterosexual adult films ... in California is entirely legal").

n22. Attorney General Report, *supra* note 19.

n23. *Id.*

n24. Clendenning, *supra* note 7.

n25. In the Western hemisphere, the incidence of HIV in Brazil is second to the United States. See *id.* At the end of 2003, approximately 660,000 people live with HIV/AIDS in Brazil. See U.N. AIDS & W.H.O., *Epidemiological Fact Sheets on HIV/AIDS and Sexually Transmitted Infections 2004 Update: Brazil*, at 2, at http://www.who.int/GlobalAtlas/PDFFactory/HIV/EFS_PDFs/EFS2004_BR.pdf (Feb. 9, 2005). At the end of 2003, approximately 960,000 people live with HIV/AIDS in the United States. U.N. AIDS & W.H.O., *Epidemiological Fact Sheets on HIV/AIDS and Sexually Transmitted Infections 2004 Update: United States of*

America, at 2, at [http://www.who.int/GlobalAtlas/PDFFactory/HIV/EFS PDFs/EFS2004 US.pdf](http://www.who.int/GlobalAtlas/PDFFactory/HIV/EFS%20PDFs/EFS2004%20US.pdf) (Feb. 9, 2005).

n26. Clendenning, *supra* note 7.

n27. *Id.*

n28. *Id.*

n29. *Id.* Dr. Sharon Mitchell explains that performers get paid more money if they do not use condoms, and "the lack of condom use is far more prevalent overseas." See also Day to Day (National Public Radio (NPR) broadcast, Apr. 26, 2004).

n30. Clendenning, *supra* note 7.

n31. Alarm May Alter Adult Trade; An HIV Scare in the Porn-Film Industry Could Lead to Government Oversight, Orlando Sentinel, Apr. 20, 2004, at A7 [hereinafter Orlando Sentinel].

n32. AIM tests performers monthly for HIV, Chlamydia and Gonorrhea. Committee on Labor and Employment Report, *supra* note 1, at 6.

n33. Flynt, *supra* note 16.

n34. Day to Day, *supra* note 29 (statement of Dr. Sharon Mitchell) ("Despite the industry's rigorous HIV-testing system, this most recent outbreak comes as no surprise.").

n35. *Id.* "Some of the greatest risks to adult film actors actually come from overseas shoots." See Morgan

O'Rourke, HIV scare shuts down adult film industry, Risk Mgmt., July 1, 2004.

n36. Clendenning, *supra* note 7.

n37. Scott Ross, Nothing Prevents Performers From Breaking New HIV Testing Protocols, Adult Video News (AVN), Oct. 20, 2004, (AVN is the leading industry news website), at [http://www.avn.com/index.php?Primary Navigation=Articles&Action=View Article&Content ID=201836](http://www.avn.com/index.php?Primary%20Navigation=Articles&Action=View%20Article&Content%20ID=201836) (Mar. 1, 2005).

n38. Clendenning, *supra* note 7 ("James worked with 13 women before testing positive for HIV. Three of those women have tested positive.").

n39. *Id.* Fifty-three performers who had sexual contact with James and Roxx were quarantined until their HIV status could be confirmed. The industry has approximately twelve hundred performers. Flynt, *supra* note 16; see also Orlando Sentinel, *supra* note 31 ("There are about 200 adult-film producers; about 75 percent of them have stopped making films."). There are apparent discrepancies concerning the number of production companies reported to have actually participated in the moratorium.

n40. Committee on Labor and Employment Report, *supra* note 1, at 6-7.

n41. Nick Madigan, Officers Get List of Names of Actors in Sex Films, N.Y. Times, Apr. 22, 2004, at A16.

n42. *Id.*; see also Cal. Lab. Code 6300 (Deering 2005); Division of Occupational Safety and Health (DOSH), Vital information for workers and employers in the adult film industry, at <http://www.dir.ca.gov/DOSH/AdultFilmIndustry.html> (Sept. 27, 2004) ("[Cal/OSHA] requires employers to provide a safe and healthful workplace for employees, and pay the costs of their health and safety program. This same act gives Cal/OSHA jurisdiction over virtually all private employers in California, including employers in the adult film industry.").

n43. See Now Mainstream, Adult Film Industry Says Government Mandates Could Drive It Back Underground, 31 Cal. O.S.H. Rep., No. 24, June 11, 2004 ("The core issue is that [DOSH] does not have

jurisdiction outside of the employer-employee relationship.") [hereinafter Now Mainstream]; see also Cal. Lab. Code 6304.5, 6307, 6308 (Deering 2005).

n44. Cal. Lab. Code 3300, 6304, 6304.1(a), 6304.5, 6307, 6308 (Deering 2005); Now Mainstream, *supra* note 43 ("Cal/OSHA was approached in 2003 about its regulatory jurisdiction over adult films, and the Division of Occupational Safety and Health has identified two regulations as being applicable to the industry - the Bloodborne Pathogens standard ... and the Injury and Illness Prevention Program standard ...").

n45. "Until recently, Cal-OSHA had never received or investigated a health-related complaint for the adult-film industry." Harrison Sheppard, *Adult-Film Law Mulled Before HIV Outbreak*, Daily News of L.A., May 11, 2004.

n46. Committee on Labor and Employment Report, *supra* note 1. The San Fernando Valley is part of the 42nd Assembly District. California State Assembly, Assemblyman Paul Koretz, Forty-second Assembly District, at <http://democrats.assembly.ca.gov/members/a42/> (last visited, Aug. 3, 2005).

n47. Committee on Labor and Employment Report, *supra* note 1; Free Speech Coalition 2, *supra* note 18; see also Now Mainstream, *supra* note 43.

n48. Committee on Labor and Employment Report, *supra* note 1; Free Speech Coalition 2, *supra* note 18.

n49. Committee on Labor and Employment Report, *supra* note 1, at 11.

n50. Other recommendations include: No government involvement; vaccinations for preventable conditions; industry encouragement of condom only policies; requiring safe sex messages at the beginning of adult films; etc. *Id.*

n51. Press release, Cal/OSHA, Cal/OSHA issues citations to adult film companies for failing to protect employees from health hazards, IR #2004-10 (Sept. 16, 2004), at <http://www.dir.ca.gov/DIRNews/2004/IR2004-10.html> (Feb. 3, 2005); The citations report that the adult film production companies violated the bloodborne pathogens standard and the injury illness and prevention

standard. Adult Industry, Adult Consequences, *supra* note 8; "The citations are the first the state has ever issued for an adult film set, and they mark a new level of oversight by workplace regulators." Kerry Cavanaugh, Adult Film Firms Fined for HIV Cases, Daily News of L.A., Sept. 17, 2004.

n52. Cal.Code Regs. tit. 8, 5193(c)(1)(A) (2005).

n53. "Both production companies are owned by the same person, identified as Phillip Rivera, and one set of citations is likely to be dropped." Adult Industry, Adult Consequences, *supra* note 8.

n54. Scott Ross, Evasive Angels and TTB Productions Appeal Cal/OSHA Citations, AVN, Oct. 7, 2004.

n55. Scott Ross & Mark Kernes, Adult Industry Shocked at Employee Status of Adult Performers, AVN, Sept. 18, 2004, at [http://www.avnonline.com/index.php?Primary Navigation=Web Exclusive News&Action=View Article&Content ID=192323](http://www.avnonline.com/index.php?Primary%20Navigation=Web%20Exclusive%20News&Action=View%20Article&Content%20ID=192323) (Sept. 18, 2004); Cal/OSHA consulted the Chief Legal Counsel for the Labor Commissioner to determine that adult film performers are employees. See also Adult Industry, Adult Consequences, *supra* note 8; Cavanaugh, *supra* note 51 ("Adult filmmaking is a unique subset of commercial filmmaking. It's going to be a difficult situation to come up with universal regulations.") (statement of Jeffery Douglass, Attorney and Chair of the Free Speech Coalition).

n56. Committee on Labor and Employment Report, *supra* note 1.

n57. Ross & Kernes, *supra* note 55; Adult Industry, Adult Consequences, *supra* note 8; Caitlin Liu & Eric Malnic, 2 Porn Producers Get Safety Citations; Cal/OSHA fines the Van Nuys firms for allegedly allowing unprotected sex by actors, L.A. Times, Sep. 17, 2004, at B1.

n58. S.G. Borello, 769 P.2d at 403.

n59. *Id.* at 405; Cal. Lab. Code 6300 (Deering 2005).

n60. Id. at 403.

n61. Id. at 406.

n62. *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318 (1992); see also Fischer, *supra* note 11, at 537 ("Where a statute lacks a helpful definition of the term employee, the common law test, as stated in *Nationwide*, should be applied.").

n63. *S.G. Borello*, 769 P.2d at 403.

n64. Id. at 406.

n65. Restatement (Second) of Agency 220 (1958).

n66. Fischer, *supra* note 11, at 538.

n67. *Nationwide Mutual Insurance*, 503 U.S. at 322 (citing *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989)).

n68. *S.G. Borello*, 769 P.2d at 403.

n69. The common law test is summarized in the Restatement (Second) of Agency, 220. Fischer, *supra* note 11, at 537; Restatement (Second) of Agency 220 (1958).

n70. *S.G. Borello*, 769 P.2d at 404; Restatement (Second) of Agency 220 (1958) (laying out the factors that indicate an employment relationship).

n71. Holly J. Wilmet, *Naked Feminism: The Unionization of the Adult Entertainment Industry*, 7 *Am. U.J. Gender Soc. Pol'y & L.* 465, 473 (1999).

n72. *Id.*; see also 29 U.S.C. 202(a) (1994).

n73. Fischer, *supra* note 11, at 547.

n74. Silk, 331 U.S. at 712-19. The Court used the economic realities test to determine status, while considering the "declared policy and purposes of the Act." *Id.* at 715.

n75. *Id.*

n76. *Id.*

n77. *Nationwide Mutual Insurance*, 503 U.S. at 324-325 (citing *NLRB v. United Ins. Co. of America*, 390 U.S. 254 (1968)).

n78. *Nationwide Mutual Insurance*, 503 U.S. 318 (1992) (utilizing all the factors of the employment relationship to determine employment status).

n79. *Id.* at 325.

n80. *Id.*

n81. *Pagones v. Industrial Accident Comm'n*, 72 P.2d 888 (Cal. Dist. Ct. App. 1937); *Real v. Driscoll Strawberry Associates, Inc.* 603 F.2d 748, 754 (9th Cir. 1979).

n82. *S.G. Borello*, 769 P.2d 399 (1989).

n83. The court said that the right to control was the most significant factor, but noted that there were other indicators that should also be considered. *Id.* at 404.

n84. *Id.* at 406-407.

n85. *Id.* at 406. The liberal construction of the statute should also be used by the Occupational Safety and Health statutes utilized by Cal/OSHA to regulate employee-employer relationships. Cf. Cal. Lab. Code 3202, 3353, 3600 (*Deering* 2005).

n86. *Ross & Kernes*, *supra* note 55.

n87. *Id.*

n88. *Id.*

n89. Attorney General Report, *supra* note 19.

n90. *Liu & Malnic*, *supra* note 57.

n91. Employers hire workers to satisfy their specific labor needs. Hiring independent contractors reduces an employer's tax burden. Independent contractors have fewer deductions taken from their paychecks and may earn

more money as a consequence. Marilyn Barrett, *Independent Contractor/Employee Classification in the Entertainment Industry: The Old, the New and the Continuing Uncertainty*, 13 U. Miami Ent. & Sports L. Rev. 91, 95, (1995).

n92. See e.g., S.G. Borello, 769 P.2d 399 (1989); *Toyota Motor Sales U.S.A., Inc., v. Superior Court*, 269 Cal. Rptr. 647 (Cal Ct. App. 1990).

n93. Cal. Lab. Code 6304.1(a) (Deering 2005). "'Employee' means every person who is required or directed by any employer to engage in any employment or to go to work or be at any time in any place of employment." *Id.*

n94. *Nationwide Mutual Insurance*, 503 U.S. 318 (1992).

n95. "DOSH cannot cite an employer if the worker is not an employee, and many in the adult film industry contend that performers are independent contractors." *Adult Industry, Adult Consequences*, supra note 8.

n96. *Richardson & Liu*, supra note 18.

n97. *Adult Industry, Adult Consequences*, supra note 8.

n98. *Independent contractor versus employee*, supra note 12; "[The Labor Commissioner's office] applied standard questions," including "whether the person performing the services was engaged in activities separate from that of the business, is the work part of the regular business, does the business supply to the tools, instruments and place for the work." *Adult Industry, Adult Consequences*, supra note 8; see S.G. Borello, 769 P.2d 399 (1989).

n99. *Adult Industry, Adult Consequences*, supra note 8.

n100. Id.

n101. Adult Industry, Adult Consequences, supra note 8; Independent contractor versus employee, supra note 12.

n102. Ross & Kernes, supra note 55.

n103. Id.

n104. DOSH, supra note 42.

n105. Ross & Kernes, supra note 55.

n106. Id.

n107. Id.

n108. Id.

n109. Id.

n110. Ross & Kernes, supra note 55.

n111. Barrett, *supra* note 91, at 94.

n112. I.R.S. Publication 1779 (Rev. 12-99), Cat. No. 16134L, available at: <http://www.irs.gov/pub/irs-pdf/p1779.pdf> (last visited Sept. 15, 2005).

n113. *Id.*

n114. See *supra* notes 69-70 and accompanying text.

n115. Liu & Malnic, *supra* note 57 (statement of Jeffery Douglass, industry lawyer and chairman of the Free Speech Coalition) ("Porn actors, many of whom are paid by the scene and change employers every day, "are not necessarily employees."); see Ross & Kernes, *supra* note 55.

n116. I.R.S. Publication 1779, *supra* note 112.

n117. Richardson & Liu, *supra* note 18; Dennis Romero, Foreign Affairs, L.A. City Beat, May 13, 2004 (noting that Vivid Video and Wicked Pictures, two large adult film production companies, require condom use), at: <http://lacitybeat.com/article.php?id=898&IssueNum=49> (last visited Aug. 3, 2005); Liu & Malnic, *supra* note 57; see Mark Kernes, Public Hearing Seeks Answers to HV Dilemma: Will Condom Use and HIV Testing Be The Law?, Part 4, Free Speech Coalition, June 6, 2004 (mentioning that some companies are condom optional), at: http://www.freespeechcoalition.com/news_events_col2d.htm (Sept. 27, 2004) [hereinafter Free Speech Coalition 2d].

n118. *Id.*; Committee on Labor and Employment Report, *supra* note 1, at 8-9; see also Mark Kernes, Lara Roxx: "I thought porn people were the cleanest people in the world," AVN, Apr. 17, 2004, at: <http://www.avn.com/index.php?PrimaryNavigation=Articles&Action=View Article&Content ID=80996> (Mar. 5, 2005) (Lara Roxx was given instructions for the sexual acts she was going to perform when she arrived at the set. She was told that if she was not interested in performing that sexual act, she would not perform in the production.).

n119. I.R.S. Publication 1779, *supra* note 112 ("If the business ... wants the work done in a certain way ...

this suggests that you may be an employee.").

n120. *Id.*

n121. "Market testing - and conventional wisdom - tells us that films that feature actors wearing condoms don't sell." Flynt, *supra* note 16. Non-condom movies are quickly picked up by distributors. See also Day to Day, *supra* note 29.

n122. Pornographic actor: Rates, in Wikipedia: The Free Encyclopedia, at: http://en.wikipedia.org/wiki/Pornographic_actor#Rates (last visited on March 5, 2005).

n123. Adult Industry, Adult Consequences, *supra* note 8.

n124. Richardson & Liu, *supra* note 18.

n125. S.G. Borello, 769 P.2d at 403; Toyota Motor Sales, 269 Cal. Rptr. at 654 ("An employer cannot change the status of an employee to one of independent contractor by illegally requiring him to assume burdens which the law imposes directly on the employer"); Desimone v. Allstate Ins. Co., No. C 96-03606 CW, No. C 99-02074 CW, 2000 U.S. Dist. LEXIS 18097, at 46 (N.D. Cal. Nov. 7, 2000); Independent contractor versus employee, *supra* note 12 ("It is possible that the same individual may be considered an employee for purposes of one law and an independent contractor under another law.").

n126. Richardson & Liu, *supra* note 8.

n127. Toyota Motor Sales U.S.A., 269 Cal. Rptr. at 654.

n128. "[Section 530 of the Revenue Act of 1978] provides safe harbors for businesses that have a reasonable basis for treating certain workers as independent contractors and, if its requirements are satisfied,

prohibits the Internal Revenue Service from reclassifying those workers as employees even if such workers otherwise meet the standards for employee classification." Barrett, *supra* note 91, at 92; Independent contractor versus employee, *supra* note 12.

n129. Rev. Rul. 87-41, 1987-1 C.B. 296 (1987).

n130. *Id.*; Barrett, *supra* note 91, at 99.

n131. Employment taxes are: Federal Insurance Contributions Act (FICA), the Federal Unemployment Tax Act (FUTA), and the Collection of Income Tax at Source on Wages. See Rev. Rul. 87-41, 1987-1 C.B. 296 (1987); Barrett, *supra* note 91, at 99.

n132. Independent contractor versus employee, *supra* note 12.

n133. Ross & Kernes, *supra* note 55; see *Adult Industry, Adult Consequences*, *supra* note 8.

n134. The employer's right to control the worker is the most important factor when determining worker status. The combined factors of the right of control test and the economic realities test are:

1. Whether the person performing services is engaged in an occupation or business distinct from that of the principal;
2. Whether or not the work is a part of the regular business of the principal or alleged employer;
3. Whether the principal or the worker supplies the instrumentalities, tool, and the place for the person doing the work;
4. The alleged employee's investment in the equipment or materials required by his or her task or his or her employment of helpers;
5. Whether the service rendered requires a special skill;
6. The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision;
7. The alleged employee's opportunity for profit or loss depending on his or her managerial skill;

8. The length of time for which the services are to be performed;

9. The degree of permanence of the working relationship;

10. The method of payment, whether by time or by the job; and

11. Whether or not the parties believe they are creating an employer-employee relationship may have some bearing on the question, but is not determinative since this is a question of law based on objective tests.

Independent contractor versus employee, *supra* note 12; S.G. Borello, 769 P.2d 341 (1989).

n135. Ross & Kernes, *supra* note 55.

n136. Independent contractor versus employee, *supra* note 12.

n137. See S.G. Borello, 769 P.2d 341 (1989); Fischer, *supra* note 11, at 544-545.

n138. Richardson & Liu, *supra* note 8.

n139. *Id.*

n140. *Id.*; Free Speech Coalition 2, *supra* note 18; Committee on Labor and Employment Report, *supra* note 1, at 5.

n141. Toyota Motor Sales, 269 Cal. Rptr. at 653.

n142. Free Speech Coalition 2d, *supra* note 117.

n143. *Id.*

n144. Id.

n145. Companies that require condom use will insist on using condoms. Id.

n146. Ross & Kernes, supra note 55; Lara Roxx was given instructions for the sexual acts she was going to perform when she arrived at the set. She was told that if she was not interested in performing that sexual act, she would not perform in the production. Kernes, supra note 118.

n147. Filmmakers, in an effort to decrease production costs, have done away with plot-based films, and instead instruct their performers to perform extreme sexual acts. These sex only movies are less expensive to make and take less than a day to film. Caitlin Liu & Lisa Richardson, Health Officials Concerned About Extreme Sex Acts in Porn; In the wake of the industry's recent HIV scare, doctors and others warn that stunts are putting performers at greater risk, L.A. Times, June 10, 2004.

n148. Id.

n149. Toyota Motor Sales, 269 Cal. Rptr. at 653-654 (finding that after employer determined what his worker delivered, when and to whom and what price would be charged, there was nothing left to his worker's discretion, and were indicative of an employee-employer relationship).

n150. Inherent qualities of the work may also be under the control of the employer if it furthers the goal of the business. Id.

n151. See Independent contractor versus employee, supra note 12.

n152. S.G. Borello, 769 P.2d at 550-551.

n153. Liu & Richardson, *supra* note 147.

n154. Steve Kroft, 60 Minutes: Porn In The U.S.A. (CBS television broadcast, Sept. 5, 2005), available at: <http://www.cbsnews.com/stories/2003/11/21/60minutes/main585049.shtml>.

n155. Romero, *supra* note 117.

n156. See Independent contractor versus employee, *supra* note 12.

n157. See S.G. Borello, 769 P.2d at 408-409.

n158. Personal video recorders have dramatically decreased the cost of adult film production. Attorney General Report, *supra* note 19; Liu & Richardson, *supra* note 147.

n159. The porn industry is a multibillion dollar industry. Richardson & Liu, *supra* note 8.

n160. See Independent contractor versus employee, *supra* note 12.

n161. Fischer, *supra* note 11, at 550.

n162. The adult film industry in California is a \$ 9 billion to \$ 14 billion business. Flynt, *supra* note 16.

n163. Liu & Richardson, *supra* note 147.

n164. See generally, Liu & Richardson, *supra* note 147.

n165. Most adult film production companies will not adopt a condom only policy because films containing condoms do not sell as well. Orlando Sentinel, *supra* note 31.

n166. Some performances make up the entire film if the film is a gonzo film, which is a type of film that lacks a plot and features only sexual acts. Liu & Richardson, *supra* note 147.

n167. See *supra* note 134 and accompanying text.

n168. Personal video recorders have dramatically decreased the cost of adult film production. Attorney General Report, *supra* note 19.

n169. Mark Kernes, Public Hearing Seeks Answers to HV Dilemma: Will Condom Use and HIV Testing Be The Law?, Free Speech Coalition, June 6, 2004, at: http://www.freespeechcoalition.com/news_events_col2b.htm (Sept. 27, 2004) [hereinafter Free Speech Coalition 2b].

n170. *Id.*

n171. See generally, Attorney General Report, *supra* note 19.

n172. See *supra* note 134 and accompanying text.

n173. Liu & Malnic, *supra* note 57; see also S.G. Borello, 769 P.2d at 409.

n174. Free Speech Coalition 2b, *supra* note 169.

n175. Reich v. Circle C. Investments, 998 F.2d 324, 328 (1993) (An adult entertainer's minor investment compared to her employer's investment did not suggest employee status under the economic realities test.).

n176. Personal service and simple tools are not sufficient investments indicative of independent contractor status. See S.G. Borello, 769 P.2d at 409.

n177. Fischer, *supra* note 11, at 549.

n178. *Id.*; see Reich 998 F.2d at 328 ("[Adult entertainers] do not exhibit the skill ... indicative of persons in business for themselves.").

n179. Lara Roxx had performed in adult film, mostly for Canadian internet sites, for only one month before she came to Southern California. Kernes, *supra* note 118.

n180. Romero, *supra* note 117.

n181. See *supra* note 134 and accompanying text.

n182. Fischer, *supra* note 11, at 549-550.

n183. Ross & Kernes, *supra* note 55.

n184. *Id.*; Liu & Malnic, *supra* note 57.

n185. Reich, 998 F.2d at 328.

n186. Id. at 328-329.

n187. See supra Part II.D.1.a. (IRS Test).

n188. Richardson & Liu, supra note 8.

n189. It is difficult to keep track of the HIV status of gay porn performers since they come from all over the world to San Francisco and Los Angeles to film. Free Speech Coalition 2b, supra note 169.

n190. Huffstutter, supra note 21; see Committee on Labor and Employment Report, supra note 1, at 2.

n191. Huffstutter, supra note 21; see also Adult Industry Medical Health Care Foundation, at <http://www.aim-med.org> (last visited Aug. 14, 2005).

n192. "[Southern California adult film industry employs] about 6,000 people, including set assistants, camera and lighting technicians, performers and others The AIM foundation screens about 1,200 adult movie performers a month for HIV and other STDs." Positive HIV tests causes changes in porn filming industry, supra note 15. "AIM has detected only 11 HIV cases since 1998." Flynt, supra note 16.

n193. Ross & Kernes, supra note 55.

n194. Committee on Labor and Employment Report, supra note 1; Ross & Kernes, supra note 55; Adult Industry, Adult Consequences, supra note 8.

n195. Testing Requirements, Adult Industry Medical Health Care Foundation, at <http://www.aim-med.org/NewTestingRequirements.html> (last visited Aug. 14, 2005).

n196. *Id.*; Recommendations & Requirements, *supra* note 14.

n197. Committee on Labor and Employment Report, *supra* note 1 ("STD rates for Chlamydia, and gonorrhea are 2.8%, 10% less than the general population.").

n198. "The last HIV scare in the porn industry was in 1999 and involved only one case." Day to Day, *supra* note 29. "In the six years since aim (sic) began testing, porn actors' rate of infection has been shockingly low - the last recorded case was in 1999." Amy Sohn, Rubber Bandwagon: The pornography industry's latest HIV crisis has led at least one well-known director to embrace the condom. Is this the end of porn as we know it?, N.Y. Metro.com, May 24, 2004, at: <http://newyorkmetro.com/nymetro/nightlife/sex/columns/nakedcity/n10392/>.

n199. Committee on Labor and Employment Report, *supra* note 1, at 8. "Approximately 80-90% of the gay adult films released and distributed yearly use condoms." *Id.*

n200. Free Speech Coalition 2b, *supra* note 169.

n201. The gay adult film community is not cohesive and centralized like the straight adult industry, and few gay adult film performers work in the industry regularly. Committee on Labor and Employment Report, *supra* note 1, at 8.

n202. *Id.*

n203. *Id.*

n204. Since actors are not centrally located, it is difficult to set up a regular testing facility and have the type of peer pressure that is a characteristic of the straight adult film industry. *Id.*

n205. Mark Kernes, Public Hearing Seeks Answers to HIV Dilemma: Will Condom Use and HIV Testing Be The Law?, Free Speech Coalition, June 6, 2004, at: http://www.freespeechcoalition.com/news_events_col2c.htm (Sept. 27, 2004) [hereinafter Free Speech Coalition 2c].

n206. Huffstutter, *supra* note 21. "Few retail and Internet outlets will carry [gay porn featuring unprotected sex] for fear of drawing public concern." *Id.*

n207. Richardson & Liu, *supra* note 8.

n208. *Id.*; Free Speech Coalition 2d, *supra* note 117; Committee on Labor and Employment Report, *supra* note 1, at 5.

n209. Ross, *supra* note 37.

n210. *Id.*

n211. *Id.*

n212. *Id.*

n213. *Id.*

n214. Ross, *supra* note 37.

n215. Id.

n216. Id.

n217. Id.; Free Speech Coalition 2d, supra note 117.

n218. See Flynt, supra note 16; Free Speech Coalition 2b, supra note 169.

n219. Richardson & Liu, supra note 8; Free Speech Coalition 2d, supra note 117; Committee on Labor and Employment Report, supra note 1, at 5.

n220. Richardson & Liu, supra note 8; Free Speech Coalition 2d, supra note 117; Committee on Labor and Employment Report, supra note 1, at 5.

n221. Attorney General Report, supra note 19.

n222. DOSH, supra note 42.

n223. Id.

n224. Cal. Lab. Code 6304.5, 6307, 6308 (Deering 2005).

n225. Committee on Labor and Employment Report, supra note 1, at 2; see Cal. Lab. Code 6307 (Deering

2005).

n226. See Cal.Code Regs. tit. 8, 5193(c)(1)(A) (2005). The citations also allege that the companies violated the Injury and Illness Prevention Program (IIPP) standard, and the reporting standard. The companies were subjected to the maximum penalty for the reporting violation, which was \$ 5,000, \$ 25,000 for the BBP violation, and \$ 560 for the IIPP violation. See also *Adult Industry, Adult Consequences*, supra note 8.

n227. Committee on Labor and Employment Report, supra note 1, at 9.

n228. *Id.*

n229. Cal. Lab. Code 6307 (Deering 2005).

n230. Ross, supra note 37.

n231. Committee on Labor and Employment Report, supra note 1, at 7; Free Speech Coalition 2d, supra note 117.

n232. Richardson & Liu, supra note 8; Flynt, supra note 16; Committee on Labor and Employment Report, supra note 1.

n233. Richardson & Liu, supra note 8; Free Speech Coalition 2d, supra note 117; Committee on Labor and Employment Report, supra note 1.

n234. Free Speech Coalition 2b, supra note 169.

n235. Cal. Lab. Code 6307 (Deering 2005).

n236. Cal. Lab. Code 6307, 6308 (Deering 2005).

n237. Sohn, *supra* note 198.

n238. Flynt, *supra* note 16.